FARIDAH DATO' TALIB

v.

MOHD. HABIBULLAH MAHMOOD

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. 22-126-89]
14 OCTOBER 1989

CIVIL PROCEDURE: *Injunction - Plaintiff wife sued defendant husband for assault and battery - Plaintiff applied for interim injunction against husband - Plaintiff had also instituted divorce proceedings in the Syariah Court - Question of jurisdiction - Whether the present action was prohibited by s. 9(2) of the Married Women Ordinance 1957.*

The plaintiff and defendant are married to each other. Both parties are Muslims. The plaintiff wife sued the defendant husband claiming damages for assault and battery and applied for a temporary injunction to restrain the defendant from assaulting her. The plaintiff had also instituted divorce proceedings in the Syariah Court.

The Court was asked to decide on two issues namely:

(1) whether the Court had jurisdiction to adjudicate on the plaintiff's action since it involved a matter which fell exclusively within the jurisdiction of the Syariah Court and

(2) Whether the plaintiff could institute the present action against the defendant when s. 9(2) of the Married Women Ordinance 1957 prohibited a wife from suing her husband in tort.

Held:

[1] The Court has jurisdiction to grant the reliefs sought by the plaintiff for the following reasons:

(a) The jurisdiction is provided under s. 23 of the Courts of Judicature Act 1964 read together with s. 4 of the said Act.

(b) There must be specific words in the Selangor Administration of Islamic Law Enactment 1952 or the Selangor Islamic Family Law Enactment 1984 empowering the Syariah Court to deal exclusively with the dispute raised before the Court.

(c) Under item 4 of List I of the Ninth Schedule of the Constitution, it is Parliament and not the Legislature of a state which may make laws relating to civil and criminal law and procedure and the administration of justice including, actionable wrongs.

(d) By virtue of s. 45(3) of the Selangor Administration of Muslim Law Enactment 1952, the actionable wrong, as pleaded by the plaintiff is not within the jurisdiction of the Syariah Court.

[2] The acts of assault and battery are also criminal offences. Section 9(2) of the Married Women Ordinance 1957 does not apply to a cause of action grounded on a criminal offence committed or threatened to be committed.

[Order accordingly.]

Cases referred to:
Rediffusion (Hong Kong) v. Attorney-General of Hong Kong [1970] AC 1136
Ali Mat v. Jamaliah [1974] 1 MLJ 18

Legislation referred to:
Constitution (Amendment) Act 1988, s. 8(c)
Courts of Judicature Act 1964, ss. 4, 23
Married Women Ordinance 1957, s. 9(2)
Penal Code, ss. 323, 352
Rules of the High Court 1980, O. 18 r. 19(1)
Administration of Muslim Law Enactment 1952 (Selangor), s. 45(3)

Other source referred to:
Salmond on Torts 13th Edn., p. 9

JUDGMENT

Lim Beng Choon J:

The plaintiff in this action took out a writ endorsed with a concise statement of the reliefs required in the action on 13 February 1989. At the same time she also filed an *ex-parte* summons-in-chambers (encl. 3) praying for a temporary injunction to restrain the defendant, who is her husband, from *inter alia* assaulting, harassing or molesting her and members of her family. On 15 February 1989 when the *ex-parte* summons came on for hearing, the defendant who apparently was aware of the application made by his wife, also appeared at the said hearing. No order was made and the matter was postponed *sine die* as the defendant did give an oral undertaking not to assault, harass or molest the plaintiff. However on 12 April 1989 the solicitor for the plaintiff filed an affidavit (encl. 7) complaining *inter alia* that the defendant continued to harass the plaintiff and requested the Court to restore her application for hearing *ex parte.* The matter then came on for hearing on 14 April 1989 and this Court granted the temporary injunction with liberty for the defendant to set it aside (encl. 9).

On 21 April 1989 the plaintiff filed in her statement of claim.

A notice of motion (encl. 15) was filed by the defendant on 28 April 1989 to set aside the order of this Court dated 14 April 1989 granting the temporary injunction. He also took out a summons-in-chambers on 12 May 1989 (encl. 17) to strike out the plaintiff's writ and the statement of claim under O. 18 r. 19(1) of the Rules of the High Court ('RHC'). Both of his applications came on for hearing on 29 May 1989 but the hearing was adjourned as his Counsel was sick. It was adjourned again on 19 June 1989 as plaintiff's Counsel was engaged on a criminal trial. The matter finally came on for hearing on 30 August 1989.

At the hearing on 30 August 1989 this Court was asked to decide on two issues namely:

(1) whether this Court had jurisdiction to adjudicate on the plaintiff's action since it involved a matter which fell exclusively within the jurisdiction of the Syariah Court; and

(2) whether the plaintiff could institute the present action against the defendant when s. 9(2) of the Married Women Ordinance 1957 prohibited a wife from suing her husband in tort.

I do not propose to set out in detail the arguments of the learned Counsel for the defendant. Suffice it to say that the main premises of the learned Counsel's contention are that since the plaintiff's action arises out of the material relationship between herself and her defendant husband, and that both the plaintiff and the defendant are Muslims, the matter in dispute

falls exclusively within the jurisdiction of the Syariah Court and by virtue of the recent constitutional amendments brought about by s. 8(c) of the Constitution (Amendment) Act 1988 this Court therefore has no jurisdiction to adjudicate on the plaintiff's action. Alternatively the learned Counsel contended that as the plaintiff's action was pegged on the alleged tortious acts of the defendant for which she was claiming damages, her action could not be maintained by reason of s. 9(2) of the Married Women Ordinance 1957.

Counsel for the plaintiff on the other hand argued that the disputes before this Court did not touch on matters relating to Islamic Law on marriage, divorce, maintenance, guardianship and matters connected therewith. The plaintiff here was asking for an injunction to restrain her husband from assaulting, harassing and molesting her. She was therefore asking this Court for protection against her husband's criminal acts of causing hurt.

In considering the constitutional issue, it is necessary to examine whether the action of the plaintiff falls within the jurisdiction of the Syariah Court. If it does then by virtue of s. 8(c) of the Constitution (Amendment) Act 1988, this Court "shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Court." In this connection it is important to identify the cause of action of the plaintiff from the statement of claim (encl. 11). A casual perusal of the said statement of claim is sufficient to convince me that her action is based on an actionable wrong of assault and battery which is both a civil and criminal wrong. Speaking generally, in all such cases of assault and battery the civil and criminal remedies are not alternative but concurrent each being independent of the other. The wrong doer may be punished criminally by imprisonment or otherwise and also compelled in a civil action to make compensation or restitution to the injured person - see *Salmond on Torts* 13 Edn., p. 9. I shall have more to say on this shortly. It may be true that the actionable wrong complained of might well arise out of the marital relationship of the plaintiff and her defendant husband; nevertheless, that by itself cannot, in my view, alter her cause of action. After all the security of a man's person or as in the present case, the woman's person is the most elementary of civil rights and surely it is this Court's function in the exercising of its civil jurisdiction to prevent any attack against a woman's person by violence inflicted or menaced. In adopting this proposition, I have not overlooked the fact that the plaintiff has instituted divorce proceedings in the Syariah Court. The divorce action before the Syariah Court, however, cannot to my mind render her cause of action before this Court which is pegged on the aforesaid actionable wrong less defective, nor can the said divorce action prevent her from seeking an injunction from this Court to prevent her personal safety from being violated. The very essence of this Court's civil jurisdiction is to stop and prevent the commission of such an actionable wrong. It is important to remember that since lack of jurisdiction has the consequence that the Court has no right to enter upon the inquiry as to whether there exists a state of facts which would entitle the Court to grant to the plaintiff the relief sought, the defendant here can succeed only if it is shown that, no matter what were the facts that the plaintiff would be able to establish relating to the subject matter of the dispute *viz.*, the battery, assault and harassment committed by the defendant, the Court would still have no power to grant the relief of the kind sought against the defendant. Furthermore for purposes of answering the jurisdictional question, this Court must assume that if the action were allowed to proceed the plaintiff here would be able to establish that the act and conduct of the defendant as alleged in the statement of claim would be unlawful and would affect adversely the personal safety of the plaintiff - see *Rediffusion (Hong Kong) v. Attorney-General of Hong Kong* [1970] AC 1136 at 1154. That being the case, I think it is surely untenable to suggest that this Court has no jurisdiction to grant the reliefs sought by the plaintiff when her legal right to personal safety has been contemptibly violated.

The jurisdiction of this Court to entertain the plaintiff's action is provided under s. 23 of the Courts of Judicature Act 1964. Furthermore s. 4 of that Act states:

> In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.

It follows therefore unless there are specific words in the Selangor Administration of Islamic Law Enactment 1952 or the Selangor Islamic Family Law Enactment of 1984 (These two Enactments were relied on by the learned Counsel for the defendant to support her contention about the jurisdiction of the Syariah Court) empowering the Syariah Court to deal exclusively with the dispute raised before this Court and to grant the reliefs sought by the plaintiff in this action, I am not prepared to accede to the contention of the defendant's Counsel - see *Ali Mat v. Jamaliah* [1974] 1 MLJ 18. In this context one may take note it is stated under item 4 of List I of the Ninth Schedule of the Constitution that the civil and criminal law and procedure and the administration of justice including, among other things, actionable wrongs are matters in respect of which Parliament and not the Legislature of a state may make law. Parliament is prevented from making laws only in respect of matters included in Islamic personal Law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession testate and intestate - see para. (ii) of item 4 of List I in the Ninth Schedule of the Constitution. This fortifies the proposition that since the plaintiff here is seeking for redress against an actionable wrong committed against her person it cannot therefore be said that the actionable wrong complained of falls exclusively within the jurisdiction of the Syariah Court when the Legislature of a state has no power to enact law relating to such matter. Furthermore a cursory glance at the Selangor Administration of Muslim Law Enactment 1952 is sufficient to convince me that such an actionable wrong as pleaded by the plaintiff is not within the jurisdiction of the Syariah Court - see s. 45(3) of the Enactment. Likewise such an actionable wrong is also excluded from the Selangor Islamic Family Law Enactment 1984.

For the above reasons I have no hesitation, on the authority of *Ali Mat v. Jamaliah* [1974] 1 MLJ 18, in holding that this Court has jurisdiction to entertain the action of the plaintiff.

With regard to the second issue namely whether the plaintiff is precluded by s. 9(2) of the Married Women Ordinance 1957 from instituting this action, it is to be noted that under the said section a wife cannot sue her husband in tort save for the protection or security of her property. As stated earlier even upon a cursory glance of the plaintiff's averments in her statement of claim, it is clear that the plaintiff is pegging her cause of action on the wrongful acts of assault and battery said to have been committed by the defendant husband. The alleged acts of battery are described by the plaintiff in her statement of claim as follows.

> 4. During the course of marriage between the plaintiff and the defendant, the defendant had battered the plaintiff on numerous occasions.
>
> 5. On 12 January 1989 the defendant continued to ill treat the plaintiff by butting a lighted cigarette on the plaintiff's face.

As regards to the acts of assault she alleged that the defendant kept harassing her at her place of work and making threatening phone calls. She also avers in para. 13 of her statement of claim that:

> the defendant threaten(s) and intends to harm the plaintiff and the plaintiff is living in a real state of fear and the plaintiff believe(s) or has reason to believe that the defendant will continue to threaten and injure the person unless restrained by this Honourable Court.

In view of these averments, it cannot be gainsaid that if they were true (and in considering the jurisdictional question, this Court must assume that the plaintiff would be able to prove her allegations should the action proceed to trial - see *Rediffusion (Hong Kong) Ltd.* case), the acts of battery and assault amount also to the criminal offences of causing hurt under s. 352 of the Penal Code and criminal assault under s. 323 of the said Code. A cause of action in modern law is after all merely a factional situation the existence of which enables the plaintiff to obtain a remedy from the Court. (See *Letang v. Cooper* [1965] 10 p. 232) and he is not to head his statement of claim with a description of the branch of law on which he relies. In any case although Judges may have a fairly clear practical notion of the contents of the law of tort, of contract and criminal law, they have never marked the exact boundaries of each of them and the sharp outlines of definition are alien to the common law. I therefore have no hesitation in holding that it is the criminal offences alleged to have been perpetrated or threatened to be perpetrated against her that constitute the foundation of her cause of action. Furthermore the plaintiff's request for an injunction to prevent future and threatened acts of like nature lends support to my conclusion. Whether the plaintiff is able to discharge the onus of proving the said criminal offences beyond a reasonable doubt is not a matter which the Court is required to decide at this stage.

In arriving at the above conclusion I have not overlooked that the plaintiff has also made a claim for "damages and/or aggravated damages for costs of assault and battery committed by the defendant." The framing of such a claim begs the question of whether the plaintiff is entitled to recover damages in respect of the commission of offences under the Penal Code against her. In this connection I would like to refer to the following observations of C.K. Rao the author of *Law of Damages and Compensation* 3rd Edn., at p. 44, para. 49:

> From what has been stated above, *viz*, that every wrongful act gives rise to an action for damages, it is evident that the commission of an offence under the Indian Penal Code may give rise to a civil liability for damages against the offender in addition to the liability to prosecution in a criminal Court. Every act which is an offence against the private rights of an individual can be the basis of a civil action for damages; in other words, every such offence is an actionable wrong and the injured person is not prevented from seeking civil redress despite the fact that no prosecution has been launched against the offender in the criminal Courts of the land. This in the main, constitutes the difference between the Indian and the English law. In England the distinction maintained between felony and misdemeanor is carried into the realms of civil law also and at one time it was thought that in order to prevent the compounding of felonies an action for damages for a wrong which would amount to a felony should not be maintained before the offender is criminally prosecuted. On this ground, it was held that where a servant sued her master for rape for which he had not been prosecuted in the criminal Court, the action was not maintainable and the plaintiff was non-suited. The reason of such a rule is said to be that the private remedy must be suspended until public justice shall have been satisfied. In later cases, however, the rule itself and its application were much discussed, and considering the inconvenience that might frequently result from the application of the supposed rule, it was sought to be circumvented by holding that, on the principle embodied in the maxim *nemo allegans suam turpitudinum est audiendus* (i.e., no one alleging his own baseness ought to be heard), the defendant is not allowed to take advantage of the rule either by demurrer or by plea or in any other manner and that the Court may in its discretion stay the action till the prosecution of the offender in the criminal Courts.

The author then went on to say at p. 45 para. 50:

> But in India it is a settled rule that an offender against the penal laws of the land may be sued for the wrongful act without in the first instance instituting criminal proceedings against him. In the first place it has been repeatedly held that no person is bound in law to proceed

against a wrong-doer, in both the civil and criminal Courts and if he does, it is a purely voluntary act on his part. In an early case, Sir Barnes Peacock CJ held the plaintiff in that case who sued for the value of a cow, proved to have been stolen from him was not bound to institute criminal proceedings in the first instance, and that a civil action was maintainable.

The aforesaid observations are sufficient to answer the question posed by me earlier. Furthermore the principle embodied in the maxim "*ubi jus ibi remedium*" strengthens my finding, for the plaintiff here must surely have a means to vindicate and maintain her personal safety and a remedy, if she is injured in the exercise and enjoyment of it.

For the above reasons, I hold that s. 9(2) of the Married Women Ordinance 1957 does not apply as the plaintiff's action is grounded on criminal offences committed or threatened to be committed against her.

Also found at [1990] 1 CLJ 769